BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PEDRO VASQUEZ	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,033,984
LANDSCAPES, INC.	)	& 1,033,985
Respondent	)	
AND	)	
	)	
CONTINENTAL WESTERN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the February 7, 2008 preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes (ALJ) in Docket No. 1,033,984. Respondent also appeals the February 7, 2008 preliminary hearing Order of the ALJ in Docket No. 1,033,985. Claimant was ordered for an independent medical examination with Pat Do, M.D., in Docket No. 1,033,984, after the ALJ found that claimant had suffered an accidental injury to his right foot, which arose out of and in the course of his employment with respondent on March 7, 2007, and that notice was timely provided to respondent through claimant's immediate supervisor.

Claimant was also awarded ongoing medical treatment in Docket No. 1,033,985, for an injury to claimant's right shoulder which occurred on March 20, 2007, with respondent ordered to provide claimant's counsel with the names of three qualified physicians from which claimant was to designate the authorized treating physician. The ALJ found that claimant had proven that he suffered the March 20, 2007 accidental injury, which arose out of and in the course of his employment with respondent, that timely notice was provided and that respondent had failed to prove that claimant had suffered an aggravation of his injury while preforming subsequent work with a different employer.

Claimant appeared by his attorney, Diane F. Barger of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Kirby A. Vernon of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of the Preliminary Hearing held January 22, 2008, with attachments; and the documents filed of record in this matter.

ISSUES

Docket No. 1,033,984

1. Did claimant suffer an accidental injury to his right foot on March 7, 2007, which arose out of and in the course of his employment with respondent? Claimant alleges an accidental injury to his right foot when a piece of concrete fell on the foot on March 7, 2007. Claimant alleges the accident was witnessed by claimant's supervisor "Cobos".[1] Respondent owner, Jennifer Winn, testified that she was not notified about the alleged accident until after a visit by claimant to an emergency room on March 22, 2007, which was after the alleged shoulder injury in the other docketed case.

2. Did claimant provide timely notice of the alleged accident? Again, claimant testified that his supervisor, Cobos, witnessed the alleged accident and was aware that claimant suffered the injury. Respondent owner denies any knowledge of the accident. Cobos did not testify in this matter.

3. Does claimant's need for treatment stem from the alleged accident?

ISSUES

Docket No. 1,033,985

1. Did claimant suffer an accidental injury to his right shoulder on March 20, 2007? Claimant alleges that he suffered injuries to his right shoulder on March 20, 2007, while digging with a shovel on tree roots for respondent's landscaping company. Jennifer Winn testified that her workers do not remove tree roots with shovels. They have equipment to do that work.

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[1] PH. Trans. at 10.

2. Did claimant provide timely notice of this accident? Claimant testified that he went to the emergency room at Wesley Medical Center on March 22, 2007, after seeking permission from either Ms. Winn or Staci Howard, respondent's office manager. Claimant then provided the emergency room reports to Ms. Winn immediately after the emergency room visit. Ms. Winn denies claimant ever asked for permission from either Ms. Howard or Ms. Winn to go to the emergency room. Ms. Winn does acknowledge receiving the emergency room reports shortly after the visit. She was told, at that time, of both the foot and shoulder injury claims.

3. Is claimant's need for treatment associated with the alleged injury suffered on March 20, 2007, or did claimant suffer an intervening injury while working for a different company? Ms. Winn testified that in July 2007, she saw claimant, after the alleged injury in March, wearing a t-shirt with a logo from a competitive company. Claimant was eating lunch and, later, climbed into a truck carrying the same logo. Claimant denies ever working for that company.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order in Docket No. 1,033,984 should be reversed and the preliminary hearing Order in Docket No. 1,033,985 should be affirmed. Claimant began working for respondent's landscaping company on either March 2 or March 5, 2007, as a laborer. On March 7, while helping move a large piece of concrete, a piece fell, striking claimant's right foot. Claimant alleges that he requested medical treatment, but was denied same. The incident was allegedly witnessed by claimant's supervisor, Cobos.[2] Respondent denies this incident occurred, with respondent owner testifying the first time she learned of the alleged foot injury was after claimant went to the emergency room on March 22, 2007, for a right shoulder injury. Cobos did not testify in this matter.

Claimant sought no medical treatment for this injury and continued to work until a separate accident occurred on March 20, 2007. At that time, claimant was digging tree roots with a shovel and began experiencing pain in his right shoulder. The pain did not begin at work. Instead, it began at home after work. Claimant testified that the next day, he called Jennifer Winn, respondent's owner, and requested medical treatment. Ms. Winn denies any such telephone call ever occurred.

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[2] *Id*.

Claimant went to the Wesley Medical Center emergency room on March 22, 2007, with right shoulder complaints. The Wesley Medical Center emergency room records do not contain a reference to a foot injury. The paperwork which claimant received from the Wesley Medical Center emergency room was then provided to Ms. Winn either that day or the next day. Claimant was limited to one-hand work, and respondent was unable to provide work within those restrictions. Respondent referred claimant to the Derby Family Medical Center (Derby), with the first examination being on March 27, 2007. The Derby reports discuss right shoulder pain from cutting roots with a shovel, but do not mention a foot injury.

An MRI was scheduled for April 2, 2007. Claimant failed to attend the MRI appointment, testifying at the preliminary hearing that he did not have transportation. Ms. Winn acknowledged that claimant advised respondent's office that he would miss the MRI examination.[3] Claimant was advised to reschedule the MRI test, but failed to do so.

Claimant underwent x-rays of the right shoulder at Wesley Medical Center. Claimant was diagnosed with moderate degenerative disease of the AC joint, but the x-rays were otherwise negative. No tests were preformed on claimant's foot.

Claimant was referred by respondent's insurance company to orthopedic surgeon David W. Hufford, M.D., on April 30, 2007. Dr. Hufford's examination of claimant revealed diffuse tenderness across the posterior shoulder girdle and the trapezius with multiple trigger points. There was positive impingement testing and limited range of motion, although Dr. Hufford discussed voluntary guarding as the cause of the limits. An interesting aspect of this examination is that the voluntary guarding occurred in the uninjured left shoulder as well. Dr. Hufford diagnosed claimant with a painful right shoulder, but also found claimant to be an unreliable historian with voluntary guarding. He found no reason to assign any work-related causation to claimant's alleged right shoulder injuries. There is no mention in Dr. Hufford's report of a right foot injury.

Claimant was referred by his attorney[4] to Pedro A. Murati, M.D., a board certified physical medicine and rehabilitation specialist, for an examination on May 8, 2007. Dr. Murati's report of that date contains the first medical documentation of a foot injury related to respondent's employment. In the report, the history notes that claimant had a 500-pound piece of concrete fall on his right foot. Claimant advised Dr. Murati that he was authorized to seek medical treatment for the foot after the shoulder injury, but no medical report contains mention of the foot until claimant was examined by Dr. Murati. Dr. Murati diagnosed claimant with a noticeably deformed right first toe and an apparent first toe

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[3] P.H. Trans. at 31.

[4] At that time, claimant's attorney was R. Todd King.

fracture. Dr. Murati noted tenderness in the toe, but also noted a large callus under the right first toe. He found the foot injury to have stemmed from the work-related injury of March 7, 2007.

In a separate report of that same date, Dr. Murati also discusses his examination and diagnosis of the claimant's right shoulder. Claimant advised Dr. Murati that he spent an entire shift digging holes with a shovel. By the next morning, claimant was in such severe pain in his right shoulder that he was unable to work. Dr. Murati diagnosed claimant with severe myofascial pain syndrome of the right shoulder girdles, extending into the cervical and thoracic paraspinals. His impression was of a probable rotator cuff tear versus a strain with impingement syndrome.

PRINCIPLES OF LAW AND ANALYSIS

Docket No. 1,033,984

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[5]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[7]

Claimant's allegations of a foot injury on March 7, 2007, two days after he began working for respondent, are not credible and are not supported by this record. It is nearly impossible to imagine a worker having a 500-pound piece of concrete fall on his foot and the worker not seek immediate medical treatment. In this instance, not only did claimant not seek medical treatment on the date of accident, he failed to mention the alleged foot injury on March 22, 2007, while at the Wesley Medical Center emergency room, failed to mention the foot injury on March 27, 2007, while at Derby and failed to mention the alleged foot injury on April 30, 2007, while being examined by Dr. Hufford. It was only after being

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[5] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[6] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[7] K.S.A. 2006 Supp. 44-501(a).

referred by his attorney to Dr. Murati that the foot injury was discussed. This Board Member finds that claimant's allegations of an injury to his right foot on March 7, 2007, are not supported by this record, and the Order of the ALJ should be reversed. This finding renders the remaining issues in this docketed claim moot.

PRINCIPLES OF LAW AND ANALYSIS

Docket No. 1,033,985

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[8]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[9]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[10]

Claimant alleges an injury to his right shoulder on March 20, 2007, while shoveling for respondent. Respondent denies such work ever occurred. However, in this instance, the histories provided by claimant to the Wesley Medical Center emergency room, to the facility at Derby and to Drs. Hufford and Murati are consistent. Claimant advised respondent of the alleged injuries shortly after being examined at the emergency room and reports from the emergency room were supplied to respondent's owner, Ms. Winn. This Board Member finds that claimant suffered an accidental injury to his right shoulder which arose out of and in the course of his employment for respondent on March 20, 2007,

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[11]

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[8] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[9] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[10] K.S.A. 2006 Supp. 44-501(a).

[11] K.S.A. 44-520.

Respondent denies that timely notice of this accident was provided. Yet, respondent admits that the medical records from the Wesley Medical Center emergency room were provided by claimant. Respondent then referred claimant to Derby on March 27, 2007, for an authorized examination. Clearly, this notice came within 10 days of the accident in order for a referral to be made only seven days after the accident. Claimant provided timely notice of this accident to respondent.

Finally, respondent alleges that claimant suffered an intervening accident while working for another company. This allegation comes from Ms. Winn, who saw claimant wearing a t-shirt bearing the logo of another company and climbing into a pickup, also bearing the logo of that same company, with other workers also wearing those same t-shirts. Claimant denied working for another company, and Ms. Howard admitted that she did not see claimant performing any work for that other company. It is respondent's burden to prove that claimant suffered an intervening injury so as to deny claimant workers compensation benefits in this matter. Respondent has alleged an intervening injury, but has, so far, failed to prove that claimant was working for another company, let alone that claimant was injured while so working.

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[12]

This Board Member finds that claimant has satisfied his burden of proof that he suffered an accidental injury to his right shoulder on March 20, 2007, which arose out of and in the course of his employment with respondent, and that he gave timely notice of that accident. Respondent has not proven that claimant suffered an intervening injury while working with another company. Therefore, the Order of the ALJ in Docket No. 1,033,985 should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[12] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[13] K.S.A. 44-534a.

CONCLUSIONS

Claimant failed to prove that he suffered an accidental injury to his right foot which arose out of and in the course of his employment with respondent in Docket No. 1,033,984. Therefore, the preliminary hearing Order granting claimant benefits should be reversed.

Claimant satisfied his burden in Docket No. 1,033,985, that he suffered an accidental injury which arose out of and in the course of his employment with respondent and that he provided timely notice of that accident. Respondent has failed to prove that claimant suffered an intervening injury while working for a different employer. Therefore, the preliminary hearing Order granting claimant ongoing medical treatment for the right shoulder injuries suffered on March 20, 2007, is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated February 7, 2008, in Docket No. 1,033,984 should be, and is hereby, reversed.

WHEREFORE, it is the finding, decision and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated February 7, 2008, in Docket No. 1,033,985 should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April, 2008.

HONORABLE GARY M. KORTE

c: Diane F. Barger, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge